

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented and for purposes of preliminary hearing, the Appeals Board finds:

K.S.A. 1996 Supp. 44-501(d)(2)(A) provides that the results of chemical tests are not admissible to prove impairment unless “there was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working.”

Respondent presented the medical records of St. Francis Medical Center. The ALJ excluded the drug tests results because there was no probable cause to believe that claimant was impaired from the use of marijuana while on the job on April 22, 1996.

Claimant was injured as a result of a slip and fall from a roof. Claimant had been working for 3 hours before he fell. Claimant denied being impaired at the time of the accident. He testified that he believed the reason he slipped and fell was because he stepped in wet bird droppings while carrying a sheet of plywood on a steep pitched roof.

The record contains testimony concerning claimant’s condition before his accident not only from the claimant himself but also from his employer, Bill Morris. Mr. Morris was at the job site and was working with claimant before the fall. He also attended to claimant immediately after his injury. Mr. Morris was aware that claimant had tested positive for marijuana use in the past. According to Mr. Morris, he did not notice anything peculiar about claimant that day. In fact, he said he would not put anybody up on a roof if he thought there was any kind of problem. There was no testimony from any witness to the effect that claimant exhibited any unusual behavior or appearance before the accident.

The specific evidentiary requirements established by K.S.A. 1996 Supp. 44-501(d)(2) are an exception to the general rule that in workers compensation cases the ALJ and the Appeals Board are not bound by technical rules of procedure and are to give the parties a reasonable opportunity to be heard and present evidence.⁴ The legislature obviously intended that a much stricter evidentiary standard be applied before the results of chemical tests are admitted into evidence.

The ALJ ruled that the drug test was not proper and therefore inadmissible under K.S.A. 1996 Supp. 44-501(d) because there was no probable cause to believe claimant had used, possessed or was impaired from drugs when injured.

Before the Appeals Board can consider the question regarding the admissibility of the evidence, it must first consider whether it has jurisdiction to review this appeal. In Frazier v. Steel & Pipe Supply Company, Inc., Docket No. 201,049 (Sept. 1995), the

⁴ See McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 772, 921 P.2d 257 (1996).

Appeals Board was asked to consider whether a foundation laid for the admissibility of a chemical test constituted an appealable issue from a preliminary hearing. In Frazier, the Appeals Board discussed the jurisdictional requirements of K.S.A. 44-534a and K.S.A. 1995 Supp. 44-551. The specific jurisdictional issues listed in K.S.A. 1998 Supp. 44-534a have not changed since Frazier. Those issues include whether the employee suffered an accidental injury, whether the injury arose out of and in the course of employment, whether notice was given or claim timely made, or whether certain defenses applied. The issue regarding the admissibility of evidence is not contained in K.S.A. 1998 Supp. 44-534a. Likewise, a ruling on an evidentiary question is not a jurisdictional issue under K.S.A. 1998 Supp. 44-551 because the ALJ did not exceed her jurisdiction in making the ruling.

The respondent may preserve the issue for final award as provided by K.S.A. 1998 Supp. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the January 31, 1997, Order by Administrative Law Judge Nelsonna Potts Barnes remains in full force and effect and the appeal by the claimant from that order should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

c: Gregory Lower, Wichita, KS
Kendall R. Cunningham, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director